

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

ROBERT LAWHEAD,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-04-1331-L
)	
RON WARD and THE)	
ATTORNEY GENERAL OF THE)	
STATE OF OKLAHOMA,)	
)	
Respondents.)	

ORDER

This matter is before the court for review of the Report and Recommendation entered by United States Magistrate Judge Robert E. Bacharach on April 21, 2005. Petitioner, a state prisoner appearing *pro se*, seeks a writ of habeas corpus. The Magistrate Judge recommended that the court should reject petitioner's allegation that prison officials had committed a due process violation through reliance on expunged misconduct convictions. However, the Magistrate Judge recommended that the court grant habeas relief based on an *ex post facto* violation that occurred through application of an amended prison policy (Addendum-04, Earned Credit Class, OP-060213 (eff. Apr. 9, 1997)).

Relying on Smith v. Scott, 223 F.3d 1191 (10th Cir. 2000), the Magistrate Judge concluded that the retroactive application of the 1997 policy to deduct earned credits constituted an *ex post facto* violation. Additionally, the Magistrate Judge found that, although prison authorities have restored some credits to petitioner as a result of the Smith decision, petitioner is also entitled to the credits that were never awarded because of the violation. The Report and Recommendation notes that the record is incomplete and the Magistrate Judge intends to conduct an evidentiary hearing to determine the number of credits to be awarded.

The court file reflects that respondents filed their Objection to the Report and Recommendation with Brief in Support of Objection, which the court has carefully considered. Respondents strenuously object to the Magistrate Judge's finding that petitioner is entitled to habeas relief due to an *ex post facto* violation. Upon review of the objections, however, the court finds that they do not provide sufficient grounds to overturn the recommendations of the Magistrate Judge, which are quite limited to remedying the constitutional violation that occurred when the 1997 amendment was retroactively applied to petitioner resulting in an as-yet unquantified increase in his penalty.

Upon *de novo* review of the entire case file in this matter, the court finds that the Report and Recommendation of the Magistrate Judge should be and is

hereby adopted in its entirety. This matter is recommitted to the Magistrate Judge for further proceedings pursuant to the original order of referral.

It is so ordered this 23rd day of May, 2005.



TIM LEONARD
United States District Judge